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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-274

MILTON PARNESS and BARBARA PARNESS, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Summary of petition	1
Opinions below	2
Jurisdiction	2
Questions presented	3
Constitutional and statutory provisions	4
Statement of the case	6
Reasons for granting the writ	20
Conclusion	36

Appendix (opinions below) 1a

CITATIONS

CASES:

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) 22
Anderson v. United States, 406 F.2d 529 (8th Cir. 1969) 32
Bachellar v. Maryland, 397 U.S. 564 (1970) 35
Bain, Ex parte, 121 U.S. 1 (1887) 35
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) 22, 23
Bouie v. City of Columbia, 378 U.S. 347 (1964) 30
Connally v. General Construction Co., 269 U.S. 385 (1926) 30
Griffin v. California, 380 U.S. 609 (1965) 34
Herbert Harvey, Inc. v. N.L.R.B., 424 F.2d 770 (App. D.C. 1969) 24
Holland v. United States, 348 U.S. 121 (1954) 34
Incres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963) 22
Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972) 24

Page

McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963).. 22, 24, 25
Milam v. United States, 322 F.2d 104 (5th Cir. 1963). 29
Stirone v. United States, 361 U.S. 212 (1960) 35
Stromberg v. California, 283 U.S. 359 (1931) 35
Thompson v. City of Louisville, 362 U.S. 199 (1960).. 32
United States v. Frank (unreported, 2nd Cir. 1974).. 33
United States v. Freeling, 31 F.R.D 540 (S.D.N.Y. 1962) 29
United States v. Rizzo, 418 F.2d 71 (7th Cir. 1969)... 29
United States v. Sisal Sales Corp., 274 U.S. 268 (1927) 25
United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972) 29
Windward Shipping v. American Radio Association, 413 U.S. 104 (1974) 22
Yee Hem v. United States, 268 U.S. 178 (1925) 34

MISCELLANEOUS:

18 U.S.C. § 924(c) 29
18 U.S.C. § 1341 29
18 U.S.C. § 1343 29
18 U.S.C. § 1952 29
H.Rep.No. 91-1549 ..... 21, 30
116 Cong.Rec. 591-2, 36294, 36296, 35196 23

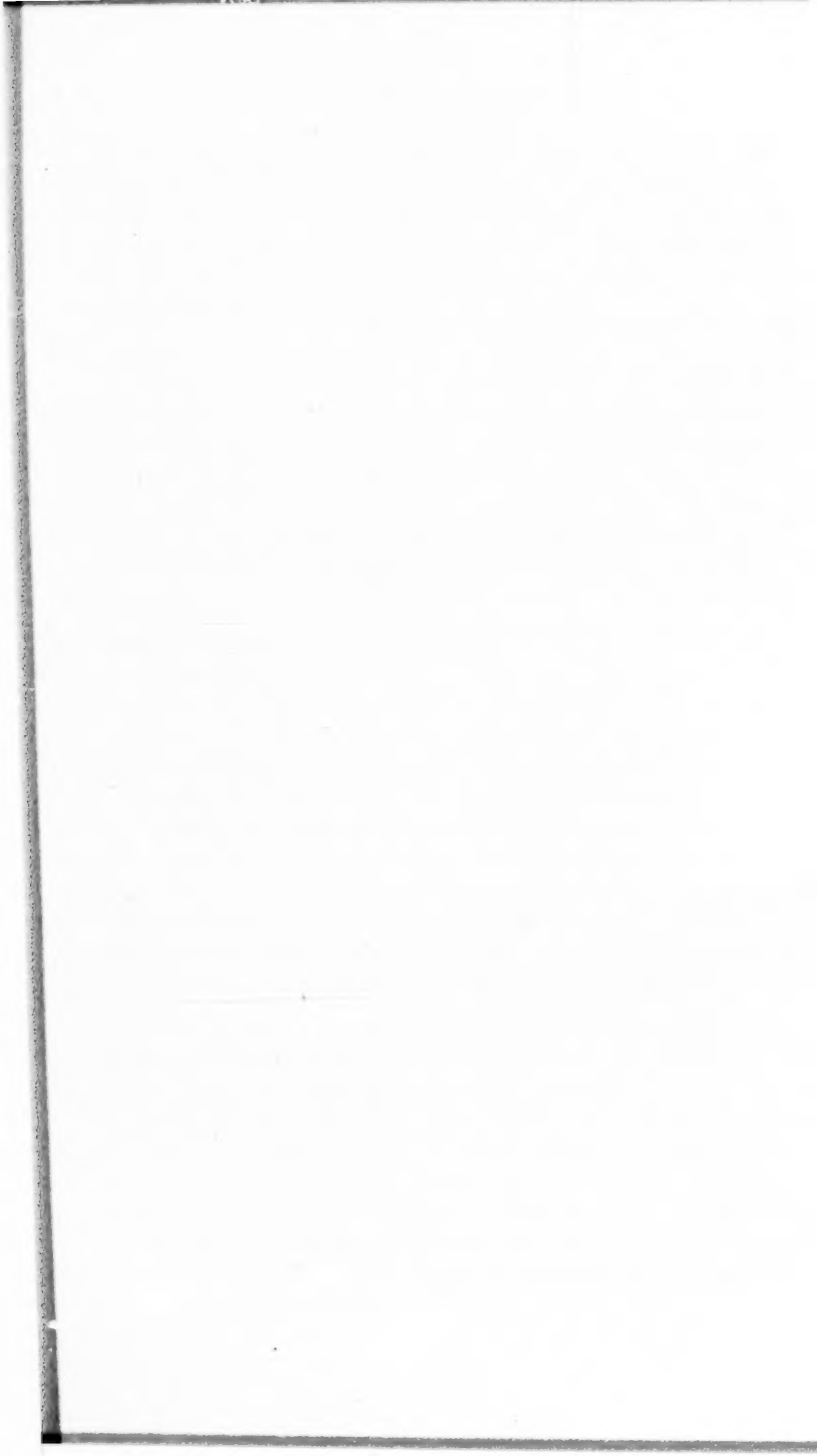
SUMMARY OF PETITION

The convictions here in issue basically rest on 18 U.S.C. § 1962(b), a part of Title IX of the Organized Crime Control Act of 1970. That section punishes anyone who, through a "pattern of racketeering activity," acquires or maintains a stock interest in or control of any enterprise engaged in interstate or foreign commerce. Three basic questions arise:

(1) Did Congress intend that § 1962(b) be used to proscribe an acquisition of stock control of a foreign enterprise, organized and operated in the Netherlands Antilles and engaged in foreign commerce with the United States? Decisions of this Court restricting the Labor Management Relations Act to domestic labor disputes are said to require a negative answer to that question.

(2) Is the § 1962(b) reference to the predicate "pattern of racketeering activity"—which is defined here to mean the commission of two or more acts "indictable" under 18 U.S.C. § 2314—consistent with the constitutional requirement of definiteness in criminal statutes? Since the § 2314 charges were not made until the § 1962(b) indictment was brought, how can the defendant know before making the stock investment that such predicate acts were "indictable"? And does a "pattern" of such predicate acts mean two or more elements of a single scheme to defraud (as here alleged), or two or more separate schemes to defraud?

(3) Does constitutional due process outlaw convictions where (a) there is a conceded lack of direct proof that any predicate crime (stealing or converting money) was committed, (b) the jury is allowed to infer from circumstantial evidence, and from the defendants' failure to take the stand, that such a crime must have occurred, and (c) the prosecution is allowed to submit to the jury an alternative theory of the crime not charged in the indictment?



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No.

MILTON PARNESS and BARBARA PARNESS, *Petitioners,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Milton Parness and Barbara Parness, respectfully pray that a writ of certiorari issue to review the judgment and opinion entered in this proceeding on June 27, 1974, by the United States Court of Appeals for the Second Circuit. Important constitutional and statutory problems of first impression are raised in this case, the first major prosecution under a new and complex federal statute—the Organized Crime Control Act of 1970.

OPINIONS BELOW

The opinion of the Second Circuit, entered on June 27, 1974, as yet not reported, is reprinted in the appendix hereto, p. 1a, *infra*.

A memorandum opinion of the United States District Court for the Southern District of New York, denying a pre-trial motion to dismiss the major count of the indictment on constitutional grounds, was filed on May 17, 1973, but is unreported. It is reprinted in the appendix hereto, p. 24a, *infra*.

JURISDICTION

On October 3, 1973, after a 13-day trial before Judge Dudley B. Bonsal of the Southern District of New York, the petitioners (now man and wife) were found guilty of various interrelated counts of an indictment charging violations of 18 U.S.C. § 1962(b) and 18 U.S.C. § 2314. Post-trial motions were denied and sentences were imposed on December 7, 1973. The wife was given a small fine and a suspended sentence, but the husband, aged 56, was given a harsh 10-year sentence and fined $55,000.

Thereafter, oral argument having been had on April 8, 1974, the Second Circuit panel of two judges (Friendly and Timbers, JJ.) affirmed the convictions and entered its opinion and judgment on June 27, 1974. See appendix p. 1a, *infra*. A timely petition for rehearing, together with a suggestion for rehearing in banc, was denied by the Second Circuit on August 15, 1974. See appendix p. 23a, *infra*. This petition for certiorari is being filed within 30 days of that denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Congress affirmatively intended to give extra-territorial effect to 18 U.S.C. § 1962(b), a part of the Organized Crime Control Act of 1970, by extending its protection against "racketeering" investment and control to foreign enterprises, organized and operating in foreign countries and engaged in foreign commerce with the United States.

2. Whether 18 U.S.C. § 1962(b), as interpreted and applied in this case, is void for vagueness under the Due Process Clause of the Fifth Amendment in its reference to the predicate "pattern of [indictable] racketeering activity" violative of 18 U.S.C. § 2314, where:

(a) the defendant is indicted, tried and convicted simultaneously on charges of violating both § 1962(b) and § 2314, pursuant to a single scheme to defraud, thereby depriving the defendant of any reasonable notice or opportunity to know, in advance of contemplating whether to make the type of investment outlawed by § 1962(b), that the predicate gathering of the proceeds for making that investment would be considered "indictable" transactions under § 2314; and

(b) the jury is charged that the predicate "pattern" of "at least two acts of racketeering activity" in violation of § 2314, as well as the use of the proceeds of such activity in violation of § 1962(b), must be committed in furtherance of a single scheme to defraud, thus rendering uncertain whether the "two acts of racketeering" must be separable from each other and from the § 1962(b) offense by transaction, scheme or time.

3. Whether the convictions of the two petitioners under the various counts of the indictment, all of which charged them with having stolen, converted or taken by fraud certain moneys at a specified time, violated their rights under the Due Process Clause of the Fifth Amendment, where:

(a) there was a total and conceded lack of proof that any money was ever missing, stolen, converted or taken by fraud;

(b) the convictions rested solely on circumstantial evidence that the petitioners were "in a position" to have stolen, converted or taken the money by fraud;

(c) otherwise impermissible inferences were allowed to be drawn from such circumstantial evidence, solely because the petitioners did not take the stand and explain the source of the money used in the transactions in question; and

(d) the prosecutor and judge presented to the jury an alternative theory of the crime, not charged in the indictment, to the effect that the moneys had not been stolen, converted or taken by fraud at the specified time but had been subsequently "withheld" from the victim.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Organized Crime Control Act of 1970, Chapter 96, 18 U.S.C. §§ 1961-1968:

CHAPTER 96 [TITLE IX]—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following [19 or more] provisions of Title 18, United States Code: . . . sections 2314 and 2315 (relating to interstate transportation of stolen property), . . .

* * * * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * * * *

§ 1962. Prohibited activities

* * * * *

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is en-

gaged in, or the activities of which affect, interstate or foreign commerce.

* * * * *

Title 18, United States Code, § 2314:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution of concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more;

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years or both.

* * * * *

STATEMENT OF THE CASE

The relevant facts in this case must be read against the backdrop of the complex mosaic of the Organized Crime Control Act of 1970.

A. The Statutory Scheme

The section of that Act at the heart of this case is codified as 18 U.S.C. § 1962(b). That section, it must be noted, is but one segment of Title IX of the Act (codified as Chapter 96 of Title 18), which is entitled "RACKETEER INFLUENCED AND CORRUPT

ORGANIZATIONS." All of the sections of Title IX, including § 1962(b), are basically designed to cleanse and protect all kinds of business organizations and enterprises from what Congress deemed to be the corrupting influence of investments and control by so-called "racketeers."

Elaborate civil provisions, similar to those contained in the federal antitrust laws, authorize orders of divestment, prohibition of business activity, and orders of dissolution or reorganization, to the end that racketeer influences be expunged. And Title IX also seeks to expunge such influences by imposing stiff criminal sanctions on those who use the proceeds of their "racketeering activity" to invest in or control legitimate business enterprises. The penalties, set forth in § 1963(a), can be as high as a $25,000 fine, 20 years in prison, and a forfeiture of the investment.

Section 1962(b) falls on the criminal side of the Title IX ledger. It makes it unlawful for any person "through a pattern of racketeering activity" to acquire or maintain "any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." The key phrase in that section is "through a pattern of racketeering activity," a phrase that is defined in other sections of the Act.

The term "racketeering activity" is defined in § 1961 (1) to mean various specified criminal acts which are "chargeable" under state law or which are "indictable" under federal law. These acts are what may be called "predicate crimes." The use of the proceeds from such predicate crimes to invest in a business enterprise is what is outlawed by § 1962(b). The investment, in

other words, must be traced to the proceeds of the predicate crimes.

Section 1961(1) lists eight state predicate crimes and more than nineteen federal predicate crimes. The only predicate crime here relevant, however, is that specified in 18 U.S.C. § 2314, relating to interstate transportation of stolen property. In pertinent part, § 2314 outlaws (1) the interstate transportation of securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud, and (2) transporting money or property in interstate commerce, or inducing the victim to travel or be transported in interstate commerce, pursuant to a scheme or artifice to defraud the victim of money or property valued at more than $5,000.

The key phrase in § 1962(b) further makes it essential that there be a "pattern" of such "racketeering activity"— or, in this case, that there be a "pattern" of "indictable" acts in violation of §2314. The term "pattern" is defined in § 1961(5) to require "at least two acts of racketeering activity, one of which occurred after the effective date of this Chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity."

And so, translating § 1962(b) in terms of the allegations in this case, that section punishes anyone who, having committed at least two acts "indictable" under § 2314, uses the proceeds from such acts to invest in or control any enterprise engaged in interstate or foreign commerce. The Act does not state whether the enterprise that is engaged in foreign commerce includes one that is organized and operating in a foreign country, at the other end of a foreign commerce transaction with the United States.

B. The Indictment

The indictment in this case was premised upon a relatively simple financial transaction. In desperate need of money was one Allan Goberman, the builder and principal stockholder of the St. Maarten Isle Hotel Corporation, N.V. ("Hotel Corp."), located in the Netherlands Antilles. Goberman needed $150,000 to repay a loan from one Holzer The petitioner Milton Parness, a business associate of Goberman, agreed to lend Goberman the needed $160,000 for the repayment, plus interest and fees. As security for the new loan, Goberman pledged Parness his 90.5% stock interest in the Hotel Corp.

In thus acquiring and maintaining that controlling interest in the Hotel Corp., Milton Parness was accused of having violated § 1962(b). And the predicate crime, the proceeds of which were allegedly used to make the loan to Goberman and thereby to acquire the stock, was said to be three violations of § 2314—to wit, Milton Parness, aided and abetted by his wife Barbara, allegedly utilized interstate facilities in stealing, converting or securing by fraud from the Hotel Corp. the $160,000 that was used for the loan to Goberman.

The indictment further alleged that the $160,000 was stolen or converted and that the Hotel Corp. stock was secured by Parness pursuant to "a scheme to defraud Allan Goberman of . . . Goberman's 90.5 percent stock interest in Hotel Corp., by means of false pretenses, representations and promises." Count One, paragraph 3(d). And as a part of that scheme to defraud, Parness allegedly withheld from Goberman that knowledge that Parness had taken or converted the $160,000 from the Hotel Corp. This supposed scheme to defraud extended from December 1, 1970, to April 5, 1971.

Thus the critical predicate factor asserted in the indictment was the act of stealing, converting or securing by fraud the $160,000 from the Hotel Corp. That was done, said the indictment, by Parness simply withholding $160,000 that he had collected from gamblers on behalf of the Hotel Corp. For some time, Parness had been engaged in organizing and supervising the transportation of groups of prospective gamblers on gambling junkets from various American cities to the gambling casino operated by the Hotel Corp. in the Netherlands Antilles, where gambling is legal. And as a part of this activity, Parness had the further duty of collecting from the gamblers, after their return to the United States, IOU's or "markers" that represented losses that the gamblers had incurred while playing on credit at the casino. Parness, after deducting from these collections the various expenses he incurred in arranging the junket airtrips, would then remit the net marker money due the Hotel Corp. Over periods of time, hundreds of thousands of dollars in marker money would be transmitted by Parness to the Hotel Corp. It was the theory of the Government, as expressed in the indictment, that Parness illegally withheld $160,000 from these marker collections and used that money to secure the Hotel Corp. stock through the loan transaction.

The indictment contained seven counts, only four of which form the basis of the petitioners' convictions. Count One, which alleged the § 1962(b) or Organized Crime Control Act violation, was the principal charge. It was structured in pertinent part as follows:

(a) The Hotel Corp. was alleged to be "a corporation established pursuant to the laws of the Netherlands Antilles" and was alleged to be an "enterprise," as de-

fined in § 1961(4), "engaged in, and the activities of which affected, interstate and foreign commerce."

(b) From about January 1, 1971, to the date of the indictment, Milton Parness was said to have directly and indirectly acquired and maintained an interest in and control of Hotel Corp. "through a pattern of racketeering activity, including fraud, extortion and the transportation of stolen money and securities in interstate commerce in violation of federal law, as defined in 18 U.S.C. §§ 1961(1)(B) and 1961(5)."

(c) The "pattern of racketeering activity" engaged in and conducted by Parness allegedly included the following:

(1) From December 1, 1970, to April 5, 1971, Parness devised and executed a scheme to defraud Goberman of his 90.5% stock interest in Hotel Corp. by means of false pretenses, representations and promises.

(2) As part of that scheme, Parness collected "hundreds of thousands of dollars belonging to Hotel Corp., including but not limited to marker collections, and deposited some of those collections in Olympic's bank account at the National Newark & Essex Bank, West Orange, New Jersey."[1]

(3) As a further part of the scheme to defraud, Parness withheld knowledge of such collections from Goberman and then loaned Goberman $160,000 "from funds which in reality belonged to Hotel Corp. itself."

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[1] The "Olympic" reference related to Olympic Sports Club, Inc., a New Jersey corporation owned by Parness that was the agency used to organize the gambling junkets to the casino in the Netherlands Antilles. Barbara Parness was an officer of Olympic and assisted Milton Parness in servicing these junkets.

Parness caused the loan to be made "in the form of cashier's checks as described below, and did not inform Goberman of the source of the funds." Goberman was then "required to transfer the pledge of his 90.5 percent stock interest in Hotel Corp."

(4) On February 4, 1971, in violation of 18 U.S.C. § 2314, having devised the above scheme to defraud, Parness caused and induced Goberman to travel from New York to New Jersey and back "in execution of said scheme."

(5) On February 4, 1971, in violation of 18 U.S.C. § 2314, Parness knowingly transported or caused the transportation in interstate commerce, from New Jersey to New York, of two cashier's checks (dated Feb. 4, 1971) in the amounts of $150,000 and $5,000, drawn on Olympic's account. These checks were purchased with funds stolen, converted or taken by fraud from Hotel Corp.

(6) On February 9, 1971, in violation of 18 U.S.C. § 2314, Parness caused another cashier's check for $5,000 to be transported from New Jersey to New York, the funds for which were also stolen from Hotel Corp.

(d) Through "the aforesaid pattern of racketeering activity" Parness allegedly acquired a 90.5% equity interest in Hotel corp. in violation of 18 U.S.C. § 1962 (b).

Counts Four and Six of the indictment simply repeated two of the § 2314 allegations (see (c)(5) and (6) of the above outline of Count One) that three cashier's checks, purchased with stolen funds, had been transported in interstate commerce on February 4 and 9, 1971.

Count Five of the indictment repeated the third § 2314 charge (see (c)(4) of the above outline of Count One) that on February 4, 1971, having devised a scheme to defraud, Parness induced Goberman to travel in interstate commerce in execution of the scheme to defraud him of his 90.5% stock interest in Hotel Corp.

The petitioner Milton Parness was named as a defendant in Counts One, Four, Five and Six. The petitioner Barbara Parness was named as an aider and abettor in Counts Four, Five and Six; but she was not named in Count One. Both petitioners were convicted as thus named in these counts. Milton Parness was sentenced to ten years imprisonment on each of these four counts, the sentences to run concurrently, and a committed fine totalling $55,000. Barbara Parness was given suspended sentences of two years imprisonment on each of the three counts of which she was convicted; she was placed on probation for three years and fined a total of $6,000.

C. The Trial

The central feature of the trial was the total inability of the Government to meet its burden of proving that Milton Parness in any way stole, converted or took by fraud the $160,000 in marker collections for use in making the loan to Goberman. The Government could not even show that any marker money, in that amount or in any amount, was ever missing from the Hotel Corp. accounts, or that any such marker money was ever left uncollected and unremitted Parness.[2]

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[2] The only semblance of an effort to prove that any marker money was missing came in the testimony of Goberman, who stated that as of the time of the loan transaction he "thought" or would "say" that some $350,000 or $400,000 in marker debts

Indeed, the Government conceded before the Second Circuit (Brief, p. 22) that its proof merely "established Parness' capacity to have stolen or converted the $160,000 which he loaned to Goberman." And the Second Circuit acknowledged that concession by noting in its opinion (see p. 8a, *infra*) that the Government "did not trace the proceeds of particular marker collections from specific gambler-debtors through Parness and Olympic to Goberman in the form of a loan." The Government's evidence, in the Second Circuit's words (see p. 9a, *infra*), showed only "that Parness was in a position to have collected and to have withheld substantial amounts of marker receipts."

The Government was thus forced to present and rely upon what the Second Circuit described as "ample circumstantial evidence from which the jury reasonably could find the requisite theft or conversion." See p. 9a, *infra*. That evidence is set forth in detail in the Second Circuit's opinion, at pp. 9a-13a, *infra*, but none of it impliedly indicated that any marker money was in fact missing or stolen or converted. At most, the circumstantial evidence showed conduct by the petitioners that might have permitted an inference of guilt had some sort of a crime been established.[3] But the record

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were either uncollected or collected and not yet remitted by Parness. See 116a, 489a-492a. But since there was always a necessary time lapse before collections were completed and before remittances were made, such testimony did not indicate anything unusual about the marker money accounts. Goberman was unable to say that the $160,000 in question was collected but never remitted by Parness. He admitted he could not substantiate any of the figures he mentioned without seeing "the records." But those records, when shown to him, did not bear out his figures.

[3] For example, much was made of the fact that on February 4, 1971, Barbara Parness deposited a $56,000 check from Olympic

remains devoid of any proof, direct or circumstantial, that Parness withheld, converted, stole, or took by fraud any of the hundreds of thousands of dollars in marker money that he faithfully collected and remitted to the Hotel Corp. during the time in question.

In its effort to justify the use of inferences to establish the corpus delicti, i.e., the stealing or converting of the marker money, the Government argued, and the Second Circuit agreed (see pp. 11a-12a, *infra*), that petitioners' failure to take the stand and to present any credible evidence as to the source of the $160,000 loaned to Goberman made it "reasonable for a jury to draw inferences from the prosecution's [circumstantial] evidence which would be impermissible if the defendant had supplied a credible exculpatory version." Presumably, in the Government's view, the otherwise "impermissible" inference that money had been stolen or converted suddenly became permissible and reasonable at that point in the trial when it was evident that the petitioners were not about to take the stand to give "a credible exculpatory version."

Doubtless in further recognition of the total failure of proof that the $160,000 had been stolen or converted, the prosecutor unexpectedly announced in his summation to

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and $99,000 in cash in Olympic's New Jersey bank; with those deposits, two cashier's checks in the amounts of $150,000 and $5,000 were purchased and used to implement the loan transaction. On February 9, another cashier's check for $5,000 was purchased with a $5,000 check from Olympic, representing the final amount of the $160,000 loan transaction. Since Olympic had sources of income and assets unrelated to the collection of markers for Hotel Corp., the mere supplying of checks and cash for the loan transaction was no indication that the $160,000 had been drawn illegally from marker collections.

the jury a totally new and different theory of the § 2314 predicate crime. In flagrant disregard of the record,[4] the prosecutor told the jury that

> ". . . the evidence showed that even though hundreds of thousands of dollars were collected by Parness and sent down to the hotel in the months of January, February, March, April 1971, Goberman wasn't able to get access to a nickel of it . . ."

The District Court's charge to the jury reflected and approved this patent effort to change the theory of the predicate crime, a theory that had not been charged or mentioned in this indictment. In the words of the jury charge (615a):

> "As I understand it the Government is contending that Mr. Parness collected money due on the markers from the junketeers or the gamblers but did not remit these amounts to the hotel. Or, if he did remit them, Mr. Goberman was denied their use."

Thus was embedded in the jury's mind an alternative to finding that any marker money was missing, stolen or converted. This alternative, labelled by the Second Circuit (see p. 13a, *infra*) as the "remittal-deprivation" theory, required that the jury believe that, at some time and in some way, Parness acted to deprive Goberman of access to marker money that had been collected and deposited in the account of the Hotel Corp. But what neither the prosecutor nor the judge explained was how such a "remittal-deprivation" could have op-

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[4] The prosecutor drew upon certain testimony by Goberman that he had been "told" that he had "no more rights" in the Hotel Corp.'s bank account in the Netherlands Antilles. But that testimony had been admitted only to show what Goberman had been "told," and "not for the truth of the statement." 146a-147a.

erated so as to finance the loan transactions on February 4 and 9, 1971—the critical and only operative dates in the indictment—and thus to acquire the 90.5% stock interest in violation of § 1962(b).

It need only be added that the jury returned only general verdicts of guilt on the various counts. It did not specify whether it found that Parness had stolen or converted the marker money, or whether it found that he had deprived Goberman of the remitted marker money in the Netherlands Antilles bank.

D. The Constitutional and Statutory Rulings

The judicial proceedings below, which culminated in the Second Circuit's affirmance of the convictions and sentences, produced several significant rulings respecting the constitutionality, the interpretation and the scope of the Organized Crime Control Act of 1970. In summary, those rulings were:

(1) By a memorandum opinion (see p. 24a, *infra*), the District Court denied a pre-trial motion to dismiss Count One on the asserted ground that the § 1962(b) reference to "indictable" § 2314 predicate acts is unconstitutionally vague. The court held that since the indictment charged violations of both § 1962(b) and § 2314, "[i]n order to convict the defendant on Count One, the Government will have to prove beyond a reasonable doubt all the material elements of two or more acts which are themselves violations of 18 U.S.C. Section 2314," which section by itself "provides a sufficiently ascertainable standard of guilt." Thus, by telescoping the trial of the two "indictable" § 2314 acts with the trial of the § 1962(b) charge, the court con-

cluded that § 1962(b) was "not unconstitutional for vagueness." See pp. 26a-27a, *infra*.[5]

(2) In its charge to the jury, the District Court interpreted § 1962(b), as applied to this case through Count One, to require proof beyond a reasonable doubt of the following five elements (614a-624a):

(a) The first element, "the crucial one," was said to be whether "Mr. Parness devised a scheme or plan to defraud Mr. Goberman . . . out of his interest in the hotel corporation."

(b) The second element was said to be "whether in carrying out the scheme, Mr. Parness engaged in a pattern of racketeering activity," which was defined to mean the commission of at least two crimes under § 2314.

(c) The third element of a § 1962(b) crime was posed in question form: "Did Parness acquire Goberman's interest in the hotel corporation through this scheme to defraud and through this pattern of racketeering activity?"

(d) The fourth element was said to be whether "the activities of the hotel corporation which I referred to as the enterprise affected foreign commerce."

(e) The fifth and last element was whether "Mr. Parness acted knowingly, wilfully and unlawfully, and that he knowingly devised and carried out the scheme to defraud Goberman."

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[5] The Government's opposing memorandum (p. 3) suggested that "perhaps the word 'indictable' is used instead of the word 'criminal' in the statute because a pattern of racketeering activity can include conduct as to which criminal prosecution would otherwise be barred by the statute of limitations."

Apparently being satisfied that all five of these elements had been proved beyond a reasonable doubt, the jury found Milton Parness guilty of the Count One charge of having violated § 1962(b).

(3) The Second Circuit in no way disturbed or disagreed with the District Court's rulings in the pretrial memorandum opinion and the charge to the jury. Rather, the Second Circuit added new content and dimensions to the questions raised in this petition by ruling as follows:

(a) The Second Circuit ruled that Congress intended by its enactment of Title IX of the Organized Crime Control Act (of which § 1962(b) is a part), to proscribe the acquisition of interests in foreign businesses operating outside the United States, thus protecting those foreign enterprises from the evils of American racketeering investments. See pp. 14a-18a, *infra*.

(b) The Second Circuit further analyzed and discussed § 1962(b) in terms of its claimed ambiguity and vagueness under the Fifth Amendment, and concluded that § 1962(b), both on its face and as here applied, is not unconstitutionally vague in its two references to "indictable" predicate acts and to a "pattern of racketeering activity" under § 2314. See pp. 18a-21a, *infra*.

(c) With respect to the prosecution's last-minute switch in the theory of the predicate crime and the submission to the jury of this alternative "remittal-deprivation" theory, the Second Circuit held that "if there was error at all in this respect, it was harmless beyond a reasonable doubt." See pp. 13a-14a, *infra*.

Thus the court found it unnecessary to decide whether the submission of this new theory to the jury constituted an amendment to the indictment and permitted the jury to convict of a crime not charged.

REASONS FOR GRANTING THE WRIT

As the Second Circuit has acknowledged (p. 3a, *infra*), the constitutional and statutory issues in this case "appear to be ones of first impression." Indeed, this prosecution is one of the first brought under Title IX of the Organized Crime Control Act of 1970. The resolution of those issues by the Second Circuit will likely have a major and lasting impact upon all future prosecutions of this nature. And because the answers supplied by the Second Circuit are so highly dubious, certiorari becomes appropriate in order to insure that this new statute, which has an intrinsic importance of its own, will be properly interpreted and applied in the future.

The Organized Crime Control Act, as its name implies, was designed to deal with the nefarious activities of organized criminal mobs and syndicates. Ironically, this case involves a small entrepreneur and his wife whose alleged sins bear none of the attributes associated with the activities of such mobs and syndicates. The literal words of the Act have been applied to a single isolated loan transaction, which might be actionable under state law if any fraud were involved. That fact may serve to explain some of the tortured statutory construction indulged in below in the effort to justify the application of the Act to this "non-mobster" loan transaction. That fact, moreover, fully justifies a close scrutiny of the decision below to make certain if the Act

has been properly interpreted and applied in this instance.[6]

There are three major questions raised in this petition, each of which carries with it an importance justifying the grant of certiorari.

I. The Decision Below Giving Extraterritorial Effect to the Organized Crime Control Act Conflicts with the Principles Used by This Court in Denying Extraterritorial Effect to the Labor Management Relations Act.

Title IX of the Organized Crime Control Act, of which § 1962(b) is an integral part, is entitled "RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS." By various civil and criminal means, Title IX is primarily designed to protect legitimate business enterprises against the infiltration and acquisition of interest or control by "racketeers" or organized criminal groups. And so, when the Government here sought to use § 1962(b) to cleanse or protect a Netherlands Antilles hotel-casino enterprise against a 90.5% stock interest by an alleged racketeer, a most profound legislative question was raised. Did Congress intend Title IX to be used as a protective umbrella over all foreign enterprises throughout the world that happen to engage in foreign commerce with the United States?

The Second Circuit has given an unqualified affirmative answer to that question, finding "no indication that

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[6] Three Congressional dissenters to the adoption of Title IX of the Act warned that Title IX "runs amuck" and "embodies poor draftsmanship, and it employs penalties and investigative procedures which are both abusive and pregnant with the potential for abuse." Dissenting views of Reps. Conyers, Mikva and Ryan, H. Rep. No. 91-1549, 2 U.S. Code Cong. & Admin. News, 1970, at p. 4081.

Congress intended to limit Title IX to infiltration of domestic corporations." See p. 16a, *infra*. But that ruling raises more questions than it answers and would appear to be contradicted by the repeated decisions of this Court dealing with the territorial scope of the Labor Management Relations Act.

This Court long ago noted that "All legislation is prima facie territorial." *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909). Broadly speaking, the relevant Labor Act decisions of this Court have declared that this prima facie premise can be overcome only by a "clear" and "affirmative" expression by Congress, either in the statute itself or its legislative history, of an intent to extend a statute extraterritorially. *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 19-22 (1963); *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24, 27 (1963); *Windward Shipping* v. *American Radio Association*, 413 U.S. 104, 110-111 (1974). Without such a clear and affirmative declaration from Congress, as this Court most recently said in *Windward*, 413 U.S. at 110, courts cannot apply a statute "willy-nilly into the complex of considerations affecting foreign trade."

There are, of course, both similarities and differences between the extraterritorial considerations respecting the Organized Crime Control Act and those relating to the Labor Act. To wit:

(1) Both statutes are silent on their face as to their extraterritorial scope. Both contain broad references to employers and enterprises engaged in or affecting interstate or foreign commerce but, as the *Incres* decision made clear, 372 U.S. at 27, if the intent to ex-

tend a statute to foreign operations is not otherwise made clear, such operations will not be construed as "foreign commerce" within the meaning of the statute involved.

(2) The respective legislative histories of these two statutes yields no clear indication of an intent to extend them extraterritorially. In neither instance was the matter even considered or discussed.

(3) But the Court in *Benz,* 353 U.S. at 143-144, did find, from certain legislative references to the Labor Act being a bill of rights for American workingmen, that the boundaries of the Act were meant to include only "the workingmen of our own country and its possessions." Similarily, there are numerous references in the debates on the Organized Crime Control Act to the legislative concern with the racketeering infiltration of "our" legitimate business organizations and the resulting "threat to the American economic system."[7] See also the expressed concern by Congress, in enacting the Organized Crime Control Act, with the use of money by organized crime "to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes . . . [so as] to weaken the stability of the Nation's economic system

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[7]Senator McClellan, for example, stated that Title IX "is aimed at removing organized crime from our legitimate business organizations . . . from our organizations . . ." He also spoke of the need to eliminate the "infiltration of our legitimate organizations by the mob." 116 Cong. Rec., Part 1, pp. 591-592 (Jan 21, 1970).

Others spoke of Title IX as making it unlawful for a racketeer to acquire an interest in "business engaged in interstate commerce," a clear reference to domestic corporations. See statements by Sen. Hruska (116 Cong. Rec., Part 27, p. 36294, Oct. 12, 1970); Sen. Dole (116 Cong. Rec., Part 27, p. 36296, Oct. 12, 1970); and Rep. Cellar (116 Cong. Rec., Part 26, p. 35196, Oct. 6, 1970).

. . . and undermine the general welfare of the Nation." Section 1 of Public Law 91-452 (set forth as a Note to 18 U.S.C. § 1961).

(4) As the Second Circuit noted (p. 17a, *infra.*), the Labor Act cases involved the exercise of American sovereignty in a maritime area in which international comity was traditional and in which the potential of international discord was great. But query whether the rule of statutory construction applied in that maritime context was meant to be inapplicable to non-maritime situations where the international factors are less acute. Certainly the rule has been applied in a few such non-maritime situations.[8] And in the instant case, there is a potential degree of international discord arising from this American effort to prohibit a particular kind of stock investment in a foreign enterprise that is subject to the laws of Netherlands Antilles respecting the assignment and transfer of corporate shares.

(5) In the instant situation, like the maritime labor dispute situations in the Labor Act cases, there are numerous American ties and involvements. See opinion below, p. 15a, fn.11, *infra.* But in *McCulloch,* 372 U.S. at 18-19, this Court rejected any "balancing of contacts" approach to the question whether the Labor

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[8] See *Herbert Harvey, Inc.* v. *N.L.R.B.*, 424 F.2d 770, 773 (App. D.C. 1969), applying this rule of construction in concluding that Congress had not clearly and affirmatively expressed an intent that the Labor Board exercise jurisdiction over the operations of the World Bank.

See also *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1334 (2nd Cir. 1972), holding that § 10(b) of the Securities Exchange Act of 1934 should not be applied to govern "conduct throughout the world" where the Congressional intent is "inconclusive." The Second Circuit seems to have mis-cited this, its own case, in this regard. See p. 18, *infra.*

Act was designed to apply to a labor dispute aboard a foreign vessel, where the American contacts were substantial. And so the fact that the principals and many of the elements of the § 1962(b) crime were American based would alone not justify imposing § 1962 (b) sanctions in order to protect a foreign corporation against certain stock investors.

All of these factors combine to add weight to the question whether the rule of construction announced in the Labor Act cases should be applied to a criminal statute like the Organized Crime Control Act. The Second Circuit's refusal to follow that rule, contrary to its statement (p. 18a, *infra*), does indeed result in "breaking new ground in applying federal criminal sanctions to activities involving both American and foreign contacts." No federal criminal statute has ever been so extended for the purpose of controlling and rearranging the stock holdings of a foreign corporation subject to a foreign nation's securities laws. Not even the Sherman Act, cited (p. 18a, *infra*) as precedent by the Second Circuit, has been extended that far.[9]

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[9] The Second Circuit's citation of *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927), is misplaced. In *Sisal*, this Court merely held that a civil injunction under the Sherman Act could be obtained against a monopoly within the United States of the importation and sale of a foreign product, even though the monopoly was effectuated in part by the passage of discriminatory legislation in the foreign country. The thrust of the injunction was aimed at "forbidden results within the United States."

Moreover, Sisal was not a criminal case. And it was decided long before the birth of the statutory construction rule in the Labor Act cases, which come forth in the *Benz* case in 1957.

II. The Decision Below Adds Important Dimensions to the Constitutional Requirement of Definiteness in the Context of a New and Complex Federal Criminal Statute.

As a part of the Organized Crime Control Act of 1970, § 1962 will doubtless spawn a multitude of indictments and prosecutions in the federal war on organized crime. It is thus important that there be an early and definitive settlement of the problem that overshadows all such indictments and prosecution—i.e., the extent to which § 1962 may be inconsistent with the Fifth Amendment requirements of certainty and definiteness. This case, being the first major prosecution under § 1962, presents to this Court a fully-developed opportunity to make some of those requisite assessments.

Section 1962(b), as hereinbefore outlined (see pp. 7-8, *supra*), is not a self-contained criminal statute. It borrows its critical definitions from other portions of Title IX of the Act, and it incorporates as predicate crimes one or more of a multitude of independent federal and state criminal laws. Just what certainty and definiteness can be ascribed to § 1962(b) thus depends in large part on which predicate crimes are to be incorporated in a particular case and on what delineation is made of the resulting intertwining of § 1962(b) with the relevant predicate offenses.

Here, the Second Circuit contented itself with finding certainty and definiteness on the face of § 1962(b) and the predicate statute incorporated in this instance, § 2314. But the court utterly failed to view the vagueness problem in terms of the application of the intertwined §§ 1962(b) and 2314 in both the indictment and the charge to the jury (see pp. 10-12, 18, *supra*). The interpretation and application given those statutes by the indictment and the charge are the real sources of the

vagueness problems that the Second Circuit sought to resolve.

In a nutshell, Count One of the indictment and the charge to the jury created a chaotic vagueness in § 1962 (b) by making the critical element thereof the existence of a single scheme to defraud, pursuant to which allegedly occurred the three § 2314 incidents and the § 1962(b) stock acquisition.[11] But the notion of a "scheme or artifice to defraud" nowhere appears in the language of § 1962(b); it is a phrase to be found only in the second paragraph of § 2314 and was ostensibly relevant here only as to Count Five, one of the three § 2314 offenses charged.[12] By thus telescoping into Count One, with its "scheme to defraud" rubric, all the elements of, and cross references between, § 1962(b) and § 2314, a truly confusing statutory pattern was created. Out of that pattern, which was utilized to obtain the conviction of Milton Parness under Count One, the following vagueness problems arise:

(1) How can a defendant know or be warned, at a point prior to using the proceeds of "indictable" § 2314

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[11] Count One of the indictment seemingly alleged that the scheme to defraud was the main element of the "pattern of racketeering activity." See p. 11, *supra*. But the charge to the jury stated that the "crucial" element of § 1962(b), as charged in the indictment, was whether "Mr. Parness devised a scheme or plan to defraud Mr. Goberman . . . out of his interest in the hotel corporation." See p. 18, *supra*.

[12] Count Five, like the other two § 2314 Counts Four and Six, was incorporated *in haec verba* in Count One and had little or no independent significance. Counts Four and Six were laid under the first paragraph of § 2314, which requires no proof of a scheme to defraud. But by virtue of their incorporation into Count One, all three Counts Four, Five and Six were deemed, in the jury charge, to be elements of the "critical" scheme to defraud made requisite by § 1962(b).

transactions to make an investment outlawed by § 1962 (b), that he has committed two or more acts "indictable" under § 2314? How can he possibly be so warned where the § 1962(b) investment and the § 2314 transactions are all lumped together in one indictment as component parts of a single scheme to defraud? In short, is not the statutory warning (see § 1961(1)) against engaging in predicate "indictable" racketeering activity hopelessly vague and uncertain in this context?

Perhaps this statute means that the "indictable" acts must have led to some sort of governmental action, such as a charge or indictment or trial, prior to using the proceeds thereof. Otherwise, who or what determines if an act is "indictable," and when? To leave it to the trial on the § 1962(b) charge to determine what is "indictable," as the Second Circuit has done, is to make a mockery of the constitutional requirement of pre-trial warning as to what is "indictable." [13]

(2) How can a defendant know or be warned that he has engaged in a "pattern of racketeering activity" (see § 1961(5)) by a judicial interpretation that he is charged with causing two or three interstate incidents in pursuit of a single scheme to defraud? [14] Under such

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[13] Note that § 1961(1), in its reference to predicate state crimes, refers not to "indictable" but to "chargeable" offenses. Query whether it could be determined, in a federal prosecution under § 1962(b), whether a defendant has committed a "chargeable" state offense where state officials have never "charged" an offense under state law.

[14] It must be remembered that while the interstate check transactions mentioned in Counts Four and Six do not, under the terms of the first paragraph of § 2314, need to be in pursuit of a scheme to defraud, Count One of the indictment and the charge to the jury effectively transformed those transactions into elements of the "critical" scheme to defraud.

a judicial interpretation of the incorporated § 2314 scheme to defraud, does the § 1962(b) reference to a "pattern" of racketeering activity mean (a) at least two independent schemes to defraud forming a pattern of conduct, or (b) at least two elements of a single scheme to defraud? [15]

The Second Circuit's opinion (pp. 19a-20a, *infra*) provides no answer to those questions by its citation of decisions under the Travel Act and the Gun Control Act. Neither of those statutes involves a true "predicate crime" situation.[16] But here, if § 2314 is to retain its intended "predicate" status, both its "indictable" characterization and its role in the "pattern" of racketeering activity rise to the level of certainty only where the completed predicate activities have been subjected to some form of official indictment or threat of indictment prior to the making of an investment illegallized

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[15] Under the analogous mail fraud statute, 18 U.S.C. § 1341, which is also listed in § 1961(1)(B), courts have uniformly held "that each separate use of the mails in the execution of the scheme to defraud constitutes a separate offense." See, e.g., *Milam* v. *United States*, 322 F.2d 104, 109-110 (5th Cir. 1963). The same result has been reached as to separate wire transfers pursuant to a scheme to defraud by use of interstate wire facilities, 18 U.S.C. § 1343. See *United States* v. *Freeling*, 31 F.R.D. 540, 549 (S.D. N.Y. 1962).

[16] The Travel Act (18 U.S.C. § 1952) proscribes travel in commerce *with intent* to engage in other unlawful conduct; such unlawful conduct is merely indicative of intent and is not a predicate to a Travel Act offense. *United States* v. *Rizzo*, 418 F.2d 71, 79 (7th Cir. 1969). The Gun Control Act (18 U.S.C. § 924(c)) outlaws carrying a firearm "unlawfully" during the commission of any federal felony; the carrying of the gun is considered a separate offense and is not a predicate to prosecution for the main felony. *United States* v. *Sudduth*, 457 F.2d 1198, 1201 (10th Cir. 1972).

by § 1962(b). Otherwise, the defendant cannot be forewarned, and the prosecutor, judge and jury cannot be guided, as to what options were open after the commission of the "predicate" acts, so that the defendant "can intelligently choose, in advance, what course it is unlawful [in light of § 1962(b)] for him to pursue." *Connally* v. *General Construction Co.*, 269 U.S. 385, 393 (1926).[17]

Congress obviously intended that the "predicate" acts of racketeering, including § 2314 offenses, constitute "at least two *independent* offenses forming a pattern of conduct" (116 Cong. Rec. 35193) over a period no longer than ten years (§ 1961(5)). There was no disagreement with the statement of the three dissenters to the adoption of Title IX [18] that, as to "racketeering"

> ". . . the following must be established for a prohibited activity to exist: two or more *separate* acts of racketeering activity, thereby establishing the 'pattern,' and the direct or indirect use or investment of the gains derived therefrom." [Emphasis added].

It would seem, then, that Congress intended that the two or more racketeering activities be separated by time or transaction or scheme. And it would seem equally clear that a separateness was intended between those predicate activities and the main § 1962(b) investment.

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[17] It bears repeating that the constitutional requirement of a fair warning "turns upon the status of . . . [the] law as of a given moment in the past—or, more exactly, the appearance to the individual of the status of . . . [that] law as of that moment" just prior to embarking on the conduct in issue. *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964).

[18] Dissenting views of Reps. Conyers, Mikva and Ryan, H.Rep. No. 91-1549, 2 U.S. Code & Admin. News, 1970, at p. 4081.

Congress just as obviously did not intend that this "predicate" scheme be left vague or indefinite, particularly by intertwining the predicate crimes and the main crime into a single trial on a critical charge of engaging in a single scheme to defraud.

The Second Circuit's failure to insist that some degree of definiteness and separateness be read into the "indictable" and the "pattern" concepts not only infringes on a defendant's Fifth Amendment rights but ill serves the purpose and intent of Congress.

III. The Decision Below Escalates the Constitutional Due Process Problems Arising Out of the Government's Total Failure of Proof that a Crime Was Committed.

Ordinarily, of course, complaints about the adequacy of the Government's proof at a criminal trial do not qualify as grounds for certiorari. But this case is an exception. The proof was so inadequate as to raise constitutional due process problems of the first magnitude.

A. *The complete failure of proof*

The Second Circuit's opinion concedes that the Government utterly failed to prove the very essence of the "racketeering activity" that underlay all of the counts of this indictment. In the court's words (p. 8a, *infra.*), the Government "did not trace the proceeds of particular marker collections from specific gambler-debtors through Parness and Olympic to Goberman in the form of a loan." All that the Government did prove, said the court (p. 9a, *infra*), was that "Parness was in a position to have collected and to have withheld substantial amounts of marker receipts."

The Government failed, in other words, to prove what Counts One, Four, Five and Six charged—that on

February 4 and 9, 1971, pursuant to a scheme to defraud, Milton Parness stole, converted or took by fraud marker collections amounting to $160,000, and used interstate facilities in so doing. The Second Circuit makes no pretense of finding proof that any such marker collections were missing, withheld or unreported, that any such collections were stolen or converted, or that Milton Parness or his wife in fact stole, withheld, converted or took by fraud any marker collections on those dates. Yet proof of something missing or converted was the underlying corpus delicti in this case; tracing the proceeds of such a conversion to the making of the loan was essential to the § 1962(b) charge.

Such a total failure of proof makes these convictions invalid under the Fifth Amendment's due process clause. *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 (1960). And the Second Circuit's effort to substitute circumstantial evidence for the missing direct proof only exacerbates this constitutional issue.

It is true, of course, that once a crime has been shown to have occurred a particular defendant's guilt can be established by circumstantial evidence. *Holland* v. *United States,* 348 U.S. 121, 139-140 (1954). And where there is an otherwise unexplained shortage of goods, the fact that the shortage was due to a theft may be proved circumstantially. *Anderson* v. *United States,* 406 F.2d 529, 532 (8th Cir. 1969). But there appears to be no recorded case permitting a jury to infer from circumstantial evidence, where no so-called corpus delicti has been established, that a crime was in fact committed.

The ruling below is unique and dangerous. It seeks to substitute circumstantial for direct evidence that $160,000 was ever missing, stolen or converted. It says

it is enough if the defendant is in a "position" to have stolen some money and if he is shown to have engaged in some suspicious activities that are circumstantially consistent with his having stolen the money. The question thus raised is whether the Fifth Amendment is violated by resting a conviction on an inference from circumstantial evidence that a crime might have occurred, or probably did occur.

3. *The impermissible inferences*

The Second Circuit, obviously troubled by the lack of proof that any crime was ever committed, sought to bolster the inferences drawn from the circumstantial evidence by noting the petitioners' failure to testify and to produce any "credible exculpatory version." That failure, said the court, permitted the jury to draw inferences that would otherwise be "impermissible." See pp. 11a-12a, *infra*.

Thus is raised again a problem that is presently pending before this Court in four petitions growing out of the Second Circuit's decision in *United States* v. *Frank*.[19] But the problem is raised here in a peculiarly acute form.

This Court has recognized that where the Government has established its case, or where a statute creates

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[19] The Second Circuit in this case quoted its language in the *Frank* opinion in ruling that otherwise "impermissible" inferences could be drawn from the petitioners' failure to offer a credible exculpatory version. See p. 12a, *infra*.

Each of the four defendants in *Frank* has filed a petition here complaining *inter alia* about this notion. *Bergman* v. *United States*, No. 73-1603; *Frank* v. *United States*, No. 73-1674; *Hemlock* v. *United States*, No. 73-1849; *Hoffer* v. *United States*, No. 73-1850.

a presumption, the defendant remains quiet at his peril. *Holland* v. *United States,* 348 U.S. 121, 138-139 (1954); *Yee Hem* v. *United States,* 268 U.S. 178, 185 (1925). His failure to testify in such circumstance is simply a failure to overcome the presumption or the Government's case; and it cannot be said that the defendant is thus being compelled to be a witness against himself if he does try to overcome the Government's case.

But here the Government has failed to establish its case as to a crime having been committed. The defendant is not obligated to provide an exculpatory version of what has not been proved. And if, as suggested herein, it is impermissible for the jury to infer from the circumstantial evidence that any crime occurred in fact, that impermissible inference cannot become permissible simply because the defendant fails to give an exculpatory version of certain aspects of the circumstantial evidence.

In this context, reliance on the petitioners' failure to give an exculpatory story, in order to shore up an impermissible inference, is nothing more than an invasion of petitioners' right to remain silent. See *Griffin* v. *California,* 380 U.S. 609 (1965). For that reason, the decision below in this respect should be reviewed.

C. *The amendment to the indictment*

A final constitutional problem is raised by the Second Circuit's treatment of the prosecution's last-minute shift to the "remittal-deprivation" theory of the so-called crime, a shift sanctioned and approved in the jury charge.

That "remittal-deprivation" theory was not charged in the indictment. It was so radically different from

the "marker-conversion" theory that was embedded in the indictment as to constitute an unconstitutional amendment to the indictment. *Stirone* v. *United States,* 361 U.S. 212 (1960); *Ex parte Bain,* 121 U.S. 1 (1887). The new theory meant that the crime was not that of stealing marker money for use in the loan transactions on February 4 and 9, 1971, as charged in all counts of the indictment, but in withholding bank account money from Goberman at some unspecified later date for some unspecified reason having no connection with the loan transaction.

The Second Circuit did not deny the constitutional consequences of so gross a shift in the theory of the crime charged by the grand jury. It merely said that, if this be constitutional error, it was harmless error since it could have no effect on the Count One conviction under § 1962(b). See pp. 13a-14a, *infra.*

Such a "harmless error" doctrine is totally inapplicable here. Whatever the crime was, it was a crime involved in all the counts—Counts One, Four, Five and Six. Those counts all asserted the "marker-conversion" theory of the crime. And the "remittal-deprivation" theory was submitted to the jury as an alternative way for rendering a guilty verdict indiscriminately on all four counts.

Since the jury's verdict was a general one as to each count, it cannot be established which theory the jury used in convicting on the four counts. And if the "remittal-deprivation" theory is constitutionally suspect as constituting an amendment to the indictment, none of the convictions can stand. See *Stromberg* v. *California,* 283 U.S. 359, 368 (1931); *Bachellar* v. *Maryland,* 397 U.S. 564, 570-571 (1970).

CONCLUSION

For these various reasons, certiorari should be granted to review the Second Circuit's opinion and judgment.

Respectfully submitted,

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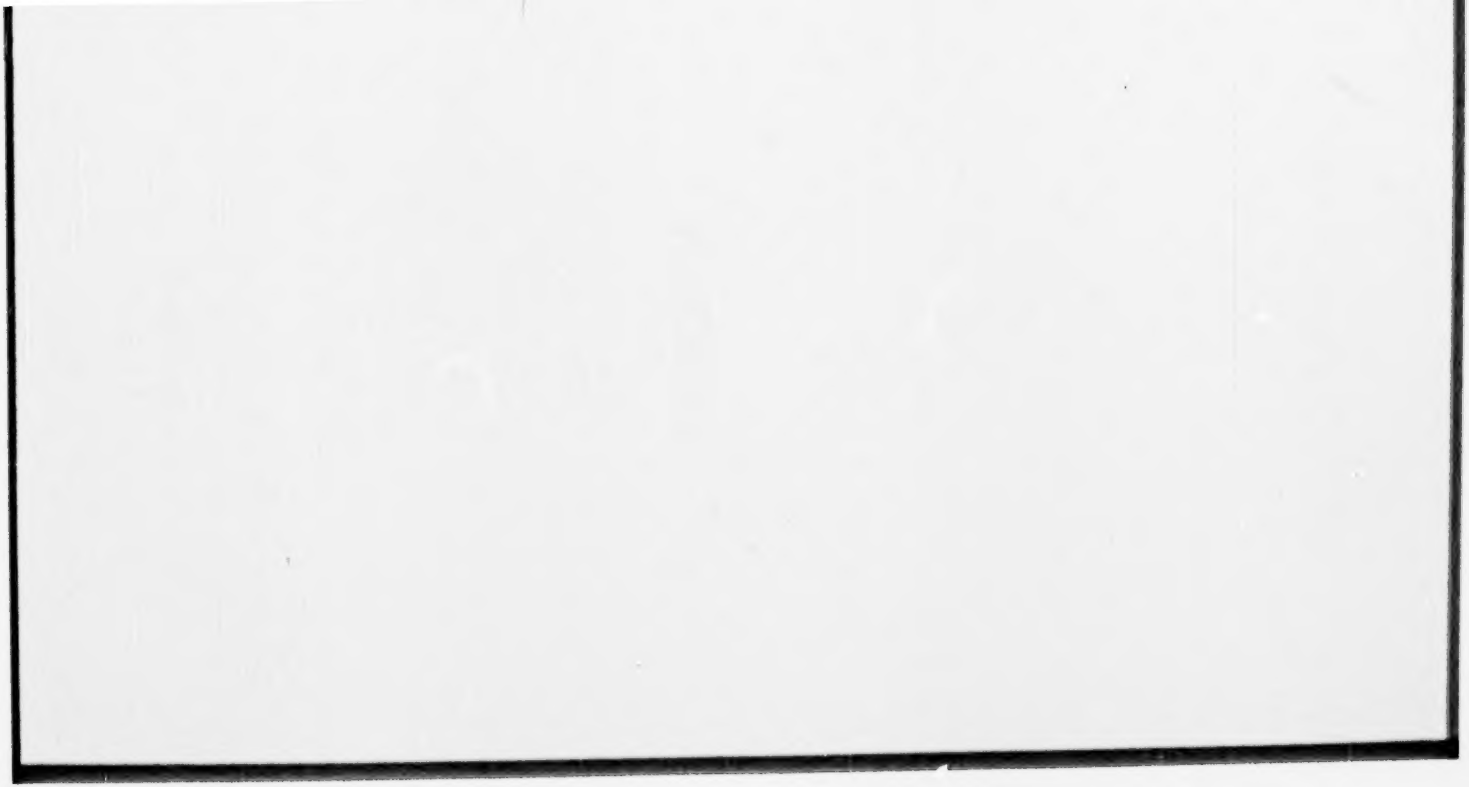
September 13, 1974

APPENDIX



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 984—September Term, 1973.

(Argued April 8, 1974 Decided June 27, 1974.)

Docket No. 74-1027

UNITED STATES OF AMERICA,

Appellee,

v.

MILTON PARNESS and BARBARA PARNESS,

Appellants.

Before:

FRIENDLY and TIMBERS,

*Circuit Judges.**

Appeals from judgments of conviction after a jury trial in the Southern District of New York, Dudley B. Bonsal, *District Judge,* finding both appellants guilty on two counts of causing interstate transportation of stolen property and on one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, in violation of 18 U.S.C. §2314 (1970); and, in addition, finding appellant Milton Parness guilty on one count of acquiring an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(b) (1970).

Affirmed.

* The parties agreed in open court that these appeals would be heard and decided by a panel of two judges.

ROY M. COHN, New York, N.Y. (Eugene Gressman and Michael Rosen, New York, N.Y., on the brief), *for Appellants.*

BART M. SCHWARTZ, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., and S. Andrew Schaffer, Asst. U.S. Atty., New York, N.Y., on the brief), *for Appellee.*

TIMBERS, *Circuit Judge:*

Appellants Milton and Barbara Parness[1] appeal from judgments of conviction entered upon jury verdicts returned on October 3, 1973 after a thirteen day trial in the Southern District of New York before Dudley B. Bonsal, *District Judge,* finding them guilty on two counts of causing interstate transportation of stolen property (Counts Four and Six) and on one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud (Count Five), in violation of 18 U.S.C. §2314 (1970); and, in addition, finding Milton Parness guilty of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity (Count One), in violation of a provision of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §1962 (b) (1970).[2]

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1 Unless otherwise stated, appellant Milton Parness will be referred to as Parness and appellant Barbara Parness will be referred to as Barbara or Barbara Landew, her name before her marriage to Milton Parness. Appellants were married after the acts charged in the indictment.

2 The indictment returned August 2, 1973, which superseded an earlier one, contained seven counts. In Counts One, Two and Three, Parness was charged with acquiring three separate enterprises through patterns of racketeering activity, in violation of 18 U.S.C. §1962(b) (1970). Counts Four through Seven charged both defendants, in violation of 18

Of the numerous claims of error raised on appeal, we find the following to be the principal ones: (1) both appellants challenge the sufficiency of the evidence; (2) Parness claims that there was a material variance between the theory of the crime charged in Count One and the theory upon which that count was submitted to the jury; (3) Parness claims that the acquisition of a foreign corporation by means of criminal acts committed in the United States does not state an offense within the meaning of §1962(b); and (4) Parness claims that the statute is unconstitutionally vague on its face and as applied. Questions (3) and (4) appear to be ones of first impression. Other subordinate claims of error are also raised.

We affirm.

I.

In view of the issues raised on appeal, including the challenge to the sufficiency of the evidence, the following summary of the events from the end of 1967 to the middle of 1971 which culminated in the indictment is believed necessary to an understanding of our rulings on those issues.

In 1967, Allan Goberman, a successful Pennsylvania businessman, learned of an opportunity to invest in the

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U.S.C. §2314 (1970), with crimes alleged to constitute the individual acts of racketeering which formed the pattern of racketeering charged in Counts One through Three.

The trial began on September 12 and concluded on October 3, 1973 when the jury returned a verdict finding both defendants guilty on Counts Four, Five and Six and Parness guilty on Count One. Counts Two, Three and Seven were dismissed at the close of the government's case.

On December 7, Parness was sentenced to concurrent ten year terms of imprisonment on each of the four counts and was fined a total of $55,000. He has been enlarged on bail pending appeal. Barbara was sentenced to concurrent two year terms of imprisonment on each of Counts Four, Five and Six and was fined a total of $6,000; execution of her sentences of imprisonment was suspended and she was placed on probation for three years.

St. Maarten Isle Hotel Corporation, N.V. (Hotel Corp.) which owned an insolvent and partially completed hotel-casino complex on the island of St. Maarten in the Netherlands Antilles. He organized the Goberman Construction Company, N.V. and arranged for the necessary financing through American sources and later from the Antillian government with which to complete the construction of the hotel-casino in January 1970. When the complex was opened in early 1970, Goberman owned 90.5% of Hotel Corp.'s stock. He also held a $3.5 million demand note from Hotel Corp. which represented money he had loaned Hotel Corp. for construction of the complex.

The hotel was moderately successful during its first few months of operation. As the winter holiday season came to an end in early 1970, however, it became apparent that the hotel's continued financial success depended upon additional income from gambling junkets to the casino. These junkets, originating primarily in the United States, were organized by junket operators (junketeers) who arranged for a group of prospective gamblers to be flown to St. Maarten and to be provided with accommodations at the hotel, all free of charge.

Each junket participant prior to his departure from the United States was required to deposit gambling "front money" with the junketeer. If his losses at the casino exceeded his initial stake, he was permitted to gamble on credit. These credit advances were evidenced by signed IOU's, commonly known as markers. When a player was unable to recoup his losses and thereby redeem his markers prior to his return to the United States, it was the responsibility of the junketeer to collect such debts and to remit the proceeds, less a commission, to Hotel Corp. The junketeer also was responsible for forwarding the front money to Hotel Corp.

In mid-1970, Goberman first met Parness, a junketeer who had been arranging successful junkets to the casino for some time through his corporation, Olympic Sports Club, Inc. In the fall of 1970, Goberman offered Parness the exclusive right to manage and direct junkets to the hotel-casino. Parness accepted. Thereafter all such junkets were arranged through Parness and Olympic. Beginning in late 1970 and continuing until his eventual acquisition of Goberman's interest in Hotel Corp., Parness assumed sole responsibility for collecting all of the hotel's outstanding marker receivables. During the same period, Olympic's sole function was arranging gambling junkets to the hotel. Almost its only income was from gamblers' front money and marker collections.

Despite the income from the gambling junkets, Hotel Corp. began to experience serious financial difficulties within a few months of the opening of the hotel-casino. In order to continue operations until permanent financing could be arranged, Goberman on October 6, 1970 obtained from Leonard Holzer of New York City a short term $150,000 loan (the Holzer loan). Goberman signed a promissory note in this amount, secured by a pledge of his entire 226,500 share interest in Hotel Corp. Goberman advanced virtually the entire $150,000 to Hotel Corp. Parness knew of the Holzer loan and of the hotel's financial straits.

In late 1970, Holzer began to threaten Goberman with foreclosure on the stock pledge unless the loan was immediately repaid. In order to obtain the necessary funds with which to repay the loan, Goberman repeatedly asked Parness for approximately $400,000 in overdue marker receivables which Parness claimed he had not yet been able to collect. Because these funds were not forthcoming from Parness or Hotel Corp., Goberman was unable to repay the loan. Holzer called the loan and on January 25, 1971 be-

gan foreclosure proceedings on Goberman's stock interest in Hotel Corp.

Shortly before Goberman's Hotel Corp. stock was to be sold at auction on February 4, 1971, Parness told Goberman that, although the outstanding markers were still uncollectible, he had arranged to borrow $150,000 and would advance that sum to Goberman to enable him to repay the Holzer loan. Parness told Goberman that the lenders had demanded that Goberman again pledge his entire interest in Hotel Corp. At Parness' direction, Goberman signed a loan agreement with two Parness nominees, Barbara Landew (Parness) and one Stanley Amsterdam, pursuant to which he was to receive $160,000[3] (the Goberman loan). Neither Barbara nor Amsterdam had supplied any of the funds loaned to Goberman. Amsterdam signed the agreement only as a favor to Parness.

On February 4, Barbara went to a bank in West Orange, New Jersey, and, with $99,000 in cash and a $56,000 check drawn on Olympic's account, purchased two cashier's checks.[4] These were to be used by Goberman to repay the Holzer loan. Later the same day, Parness arranged for Goberman, his attorney and Holzer's attorney to meet in Manhattan. From there they went to the New Jersey bank and picked up the cashier's checks which Barbara had left there. On February 9, again using Olympic funds, Barbara purchased another $5,000 cashier's check at the same bank and forwarded it to Holzer's counsel in New York as legal fees.[5]

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3 The $160,000 represented the $150,000 principal of the Holzer loan, plus $5,000 in accrued interest and $5,000 for Holzer's attorney's fees.

4 The cashier's checks were in the amounts of $150,000 and $5,000, representing the principal and accrued interest on the Holzer loan.

5 The interstate transportation of the two cashier's checks on February 4, Goberman's interstate travel on the same day, and the February 9 interstate transportation of the additional $5,000 cashier's check con-

During February and March of 1971, Goberman continued his efforts to obtain from Parness the $400,000 in unremitted marker receivables. Because this money was still not forthcoming and allegedly because Goberman was denied access to other funds which Parness had remitted to Hotel Corp., he was unable to repay Barbara and Amsterdam. They, at Parness' direction, prepared to exercise their rights under Goberman's latest pledge of his Hotel Corp. stock. On April 3, Parness' counsel drafted, and Goberman, Barbara and Amsterdam executed, a number of documents bearing various dates and purportedly prepared over a period of time in the ordinary course of business, the end result of which was that Goberman was formally divested of his 226,500 shares of Hotel Corp. stock.

Shortly thereafter, Parness acquired Aliter Holdings, N.V., a shell Antillean corporation. He did so through his cousin, Edward Levrey. On June 10, Barbara and Amsterdam transferred "their" interest in Hotel Corp. to Aliter. In a letter purportedly written by Levrey, Aliter acknowledged receipt of the stock. The letter also sought to establish that Aliter had provided the funds for the Goberman loan and that Barbara and Amsterdam had acted as its agents throughout. Aliter in fact had supplied no funds to Barbara or Amsterdam and had not even been an active corporation at the time the Goberman loan was made.

During the summer of 1971, Parness, again using Levrey as a front, acquired Terrasol Holdings, N.V., another shell Antillean corporation. Terrasol then exchanged its common stock for Aliter's holdings in Hotel Corp. In November, Parness attempted to make a public offering of Terrasol common stock in Canada. The prospectus, prepared

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stitute the violations of §2314 charged in Counts Four, Five and Six, respectively. They also constitute the pattern of racketeering activity, in violation of §1962(b), charged in Count One.

at Parness' direction, falsely described Terrasol as a Levrey family corporation and falsely represented that Levrey had purchased the 226,500 shares of Hotel Corp. stock from Goberman for $150,000 in cash. Levrey in fact had invested no funds in either Aliter or Terrasol and had had no financial dealings with Goberman.

II.

In challenging the sufficiency of the evidence, appellants claim that the government failed to establish that the cashier's checks, which they caused to be transported in interstate commerce, represented converted marker proceeds. They contend therefore that the evidence was insufficient to support their convictions of the crimes charged under §2314 (Counts Four and Six)[6] and that it was likewise insufficient to support a finding of two indictable acts on which to predicate Parness' conviction under §1962(b) (Count One). Barbara also claims that, even if the funds were unlawfully withheld, there was no evidence that she knew of it and therefore no basis for her conviction as an aider and abettor. Viewing the evidence in the light most favorable to the government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2 Cir. 1972), we hold that each of these claims is without merit.

True, the government did not trace the proceeds of particular marker collections from specific gambler-debtors through Parness and Olympic to Goberman in the form of a loan. Given the nature of the enterprise involved, the absence of such evidence is not surprising,[7] nor is it

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6 Proof of conversion of marker collections was not required for conviction on Count Five which charged appellants under paragraph 2 of §2314 with causing Goberman to travel interstate on February 4 in furtherance of the scheme to defraud him of his interest in Hotel Corp.

7 Markers often were paid in cash by carriers for the gambler-debtors. In late January 1971, agents of the Internal Revenue Service intercepted such a carrier and seized $60,000 in cash marker collections intended for Parness.

fatal to the government's case. There was evidence that Parness was in a position to have collected and to have withheld substantial amounts of marker receipts. There also was evidence of numerous and flagrant efforts by Parness and Barbara to conceal both the source of the funds and the interest of Parness in the various transactions. From this and other evidence the jury was warranted in finding the requisite nexus between the money due Hotel Corp. and the Goberman loan. In short, there was ample circumstantial evidence from which the jury reasonably could find the requisite theft or conversion.

The record establishes that Hotel Corp. failed to receive approximately $400,000 in overdue marker accounts payable during a period when Parness was solely responsible for and had exclusive control over marker collections. Parness thus had access to vast sums of money due Hotel Corp. and a clear opportunity to have concealed collections and to have withheld the proceeds.

The record further shows that Olympic derived its income almost exclusively from junket front money and marker collections. From this the jury was entitled to infer that the two Olympic checks totalling $61,000, which Barbara used on February 4 and 9 to purchase the cashier's checks, represented the proceeds of unremitted marker collections.

The efforts of Parness and Barbara to conceal the use of Olympic funds in connection with the Goberman loan tend to buttress this inference. The two Olympic checks initially were reflected on the corporation's disbursements ledger as air fare payments to a travel agency with which Barbara was associated. Actually no such payments were ever made. Parness later described these sums as "redeposits" of Olympic funds. Not until the summer of 1972, after the government had begun its investigation into the takeover of Hotel Corp., did Parness acknowledge to his

accountant that the money had been loaned to Goberman. In a further attempt to conceal Olympic's role in the acquisition of Hotel Corp., Barbara testified falsely before the grand jury investigating the takeover that it was Levrey who had provided $150,000 *in cash* to be used for the Goberman loan. Plainly she knew that Olympic checks were used and that Levrey had not supplied the funds. From these and other attempts to cover up Olympic's participation, the jury was warranted in finding that Parness and Barbara concocted a scheme to avoid the suspicions which would have stemmed from knowledge that the funds for the Goberman loan had come from a corporation which derived its income from casino receipts and which had failed to remit substantial sums due Hotel Corp.

There also was ample evidence to support the inference that the $99,000 in cash used on February 4 to enable Goberman to repay the Holzer loan represented money due Hotel Corp. The Holzer loan was repaid at a time Parness was making substantial marker collections. Shortly before the Goberman loan, as noted above, agents of the Internal Revenue Service seized $60,000 in cash marker collections intended for Parness. The jury reasonably could have found that this seizure precipitated the cover-up of Olympic's participation. But for such an unexpected occurrence, Parness would have had sufficient cash with which to have consummated the Goberman transaction undetected. Had such cash been available, Parness need not have resorted to the more easily traceable Olympic checks, and the cover-up would have been unnecessary.

But the deception went further. In addition to the efforts to conceal Olympic's role in Parness' scheme to acquire Hotel Corp., there was evidence that Parness resorted to similar schemes to disguise his own personal involvement in the Goberman loan and the subsequent clandestine cor-

porate transactions.[8] He used nominees in the loan agreement itself. He used a straw man in connection with his acquisition of Aliter and Terrasol. And he had documents prepared which falsely represented that first Aliter and then Levrey had provided the funds used to acquire Hotel Corp.

The government adduced overwhelming evidence which disproved each of these false representations, as well as evidence which exposed the implausibility of explanations offered by Parness for other false representations. The jury surely was justified in concluding that all were part of Parness' scheme to cover up his conversion of money due Hotel Corp. In short, in the context of this record and in view of the complete absence of any credible explanation[9] as to the source of funds used in connection with the Goberman loan, we fail to see how the jury could have reached any conclusion except that Parness had withheld marker collections and had used the proceeds of such collections and the front money to acquire Goberman's interest in Hotel Corp.[10] As we recently stated in *United States* v.

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8 Parness also sought to conceal his interest in Olympic itself. He executed corporate documents in the name of Edward Feldman without the latter's knowledge. Later he tried to persuade Feldman to testify falsely at trial that he had authorized Parness to use his name.

9 Neither appellant testified at trial. The only witnesses called by the defense were John Blandino, the executive assistant manager at the hotel in 1970, and Larry Faigin, Esq., the attorney who represented Holzer in the Goberman transaction.

10 Relying on *Griffin* v. *California*, 380 U.S. 609 (1965), appellants argue that the prosecutor's reference in his summation to the lack of any credible explanation as to the source of the funds constituted an impermissible comment on their failure to produce evidence or to testify on their own behalf. Read in context, we hold that the prosecutor's remarks constituted fair comment on the weakness inherent in the entire defense case and not improper comment upon appellants' silence. See *United States* v. *Dioguardi*, —— F.2d ——, —— (2 Cir. 1974), slip op. 1163, 1183-84 (January 4, 1974); *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2 Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

Frank, —— F.2d ——, —— (2 Cir. 1974), slip op. 1883, 1896-97 (Feb. 25, 1974):

> "[T]he defendants were not required to testify or to present any case at all, and the jury could not permissibly draw an adverse inference simply from their failure to take the stand. But the self-incrimination clause does not elevate a defendant's silence, . . . to the level of a convincing refutation. When a defendant has offered no [credible explanation], it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version . . . ."

Cf. *United States* v. *Sheiner*, 410 F.2d 337, 340 (2 Cir.), *cert. denied*, 396 U.S. 825 (1969).

We also reject Barbara's claim that the evidence was insufficient to support her conviction as an aider and abettor. Her active involvement in virtually every aspect of Parness' scheme to acquire Hotel Corp. and the subsequent cover-up warranted the jury in finding that she had associated herself with the venture and had sought to make it succeed. *Nye & Nissen Corp.* v. *United States*, 336 U.S. 613, 619 (1949), quoting in part from *United States* v. *Peoni*, 100 F.2d 401. 402 (2 Cir. 1938) (L. Hand, *J.*); *United States* v. *Manna*, 353 F.2d 191, 192 (2 Cir. 1965), *cert. denied*, 384 U.S. 975 (1966).

It is not an overstatement to characterize the evidence of Barbara's participation as overwhelming. She purchased the cashier's checks used in connection with the Goberman loan. She stated to the person who accompanied her to the bank on February 4 that she was arranging for the takeover of a hotel. She allowed her name to be used in the loan agreement. She participated in executing on April

3 the bogus documents by which Goberman was formally divested of his stock. She acquiesced in the transfer without consideration of "her" interest in Hotel Corp. to Aliter.

Moreover, she testified falsely before the grand jury that Levrey had furnished $150,000 in cash to be used for the Goberman loan. It is axiomatic that exculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force. *United States* v. *Lacey*, 459 F.2d 86, 89 (2 Cir.), *cert. denied*, 409 U.S. 860 (1972); *United States* v. *DeAlesandro*, 361 F.2d 694, 697-98 (2 Cir.), *cert. denied*, 385 U.S. 842 (1966). This rule has especially compelling application here, for Barbara's false testimony tended not only to conceal her own participation in the transfer of the stolen funds but furthered the cover-up initiated by her husband.

III.

Parness claims that his conviction under §1962(b) must be reversed because there was a material variance between the theory of the crime charged in Count One and the theory upon which that count was submitted to the jury. We hold that, if there was error at all in this respect, it was harmless beyond a reasonable doubt.

Count One charged Parness under §1962(b), among other offenses, with acquiring Goberman's interest in Hotel Corp. through a pattern of racketeering activity involving the conversion and interstate transportation of marker proceeds. The evidence established that Parness gained control of Hotel Corp. by (1) withholding funds due Hotel Corp., (2) loaning a portion of these funds to Goberman, and (3) thereafter preventing him from repaying the loan by continuing to conceal marker collections and by denying him access to other funds which Parness had remitted. Parness claims that this latter "remittal-deprivation"

scheme was not charged in the indictment. He argues that the district court, in instructing the jury to consider it, in effect sanctioned an amendment of the indictment and permitted the jury to convict him of a crime not charged.

In our view, even if the jury did consider the so-called "remittal-deprivation" evidence and assuming such evidence was not precisely within the literal scope of the allegations of the indictment, that could have had no effect whatever on his conviction under §1962(b). Parness was charged with and convicted of three separate violations of §2314. Counts Four and Six charged interstate transportation of cashier's checks on February 4 and 9. Count Five related to Goberman's interstate travel on February 4. Convictions on any two of these counts were sufficient under §1961(5) to establish the "pattern of racketeering activity" necessary for a conviction under §1962(b). In order to find Parness guilty on Counts Four and Six, the jury was required to find only that he converted marker collections and caused the proceeds to be transported in interstate commerce. Whether Goberman at some later date may or may not have been denied access to remitted funds has no bearing on such a finding. Parness' convictions on Counts Four and Six were unaffected by the jury's alleged consideration of the "remittal-deprivation" evidence. Such convictions provide sufficient predicates for his conviction under §1962(b).

IV.

Parness claims that, in enacting Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. § 1961 et seq. (1970), of which §1962(b) is a part, Congress did not intend to proscribe the acquisition of foreign businesses by means of criminal conduct committed in the United States despite the impact on domestic commerce. Specifically, he argues that his take-over of Hotel Corp., an Antillean cor-

poration, cannot be said to constitute an offense under §1962(b) because Hotel Corp. is not an "enterprise" within the meaning of the Act. This argument is predicated upon an unreasonably narrow interpretation of the statute and is refuted by the language and legislative history of §1962(b).

Section 1962(b) proscribes the acquisition of "any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."[11] "Enterprise" is defined in §1961(4) to include "any . . . corporation". On its face the proscription is all inclusive. It permits no inference that the Act was intended to have a parochial application. The legislative history, moreover, strongly indicates the intent of Congress that this provision be broadly construed. For example, the House Report on §1962 states that:

> "*any acquisition* meeting the test of subsection (b) is prohibited *without exception*." (emphasis added)[12]

We find Parness' claim unpersuasive for yet another reason. It presupposes that in enacting §1962(b) Congress intended to focus exclusively upon the enterprise acquired and sought to protect only American institutions. There is no indication that the statute was meant to have such a limited remedial scope. On the contrary, its legislative

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11 We reject out of hand the claim that the activities of Hotel Corp. did not have the requisite effect on interstate or foreign commerce. It was owned by Goberman, an American citizen. It was financed by Pennsylvania banks and Massachusetts businessmen. It had numerous domestic creditors. It served primarily American tourists. And its accounts were payable in U.S. dollars to Olympia, a New Jersey corporation.

12 H.R. No. 1549, 91 Cong. 1st Sess. (1970), quoted in 2 U.S. Code Cong. & Admin. News 4033 (1970).

Indeed, Congress clearly intended that the Act as a whole "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, §904 (1970).

history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises.

In its Statement of Findings and Purpose, by way of preface to Title IX, Congress made clear its concern for American investors and businessmen, as well as American institutions:

> "(1) organized crime in the United States . . . annually drains billions of dollars from America's economy by unlawful conduct . . . ; (4) organized crime activities . . . weaken the stability of the Nation's economic system, harm innocent investors . . . and undermine the general welfare of the National and [American] citizens; . . ." [13]

Moreover, the provisions of §§1963 and 1964 for broad civil remedies to victims of such infiltration further indicate the intent of Congress to protect the individual, as well as the "enterprise".

In short, we find no indication that Congress intended to limit Title IX to infiltration of domestic enterprises. On the contrary, the salutary purposes of the Act would be frustrated by such construction. It would permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise. We reject any such construction.

Parness nevertheless advances an argument based on cases arising under the Labor Management Relations Act,

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13 Pub. L. No. 91-452, §1 (1970).

The floor debate on the Act further indicate the concern of Congress in protecting the American economy as a whole. E.g., 115 Cong. Rec. 5874 (1969) (remarks of Senator McClellan); 116 Cong. Rec. 35193 (1970) (remarks of Congressman Poff); 116 Cong. Rec. 35327 (1970) (remarks of Congressman Randall).

29 U.S.C. §141 et seq. (1970). They deal with labor disputes involving alien staffs aboard foreign flag vessels operating in United States territorial waters. E.g., *Windward Shipping (London) Ltd.* v. *American Radio Assn.*, —— U.S. —— (1974), 42 U.S.L.W. 4234 (U.S. Feb. 19, 1974); *McColloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963). Parness argues that we cannot apply §1962(b) to his acquisition of Hotel Corp. unless "the affirmative intention of Congress [is] clearly expressed." *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957). His reliance on this line of cases is misplaced.

First, the rather obvious proposition for which these cases stand is simply that a court should consider the legislative history of a statute to determine its applicability to a given factual situation. *International Longshoreman's Local 1416* v. *Amdriadne Shipping Co.*, 397 U.S. 195, 198-200 (1970). Having done so here, we have concluded that Congress intended to make criminal the acquisition of any "enterprise" having the requisite nexus with interstate or foreign commerce if done in the manner proscribed by the statute.

Secondly, the *Benz-McColloch-Windward* line of cases involved the exercise of American sovereignty—here, in the context of American labor law—in a regulatory area in which international comity was traditional. *Windward Shipping (London) Ltd.* v. *American Radio Assn., supra*, —— U.S. at ——, 42 U.S.L.W. at 4237; *McColloch* v. *Sociedad Nacional, supra*, 372 U.S. at 21. These cases presented difficult issues in the "delicate field of international relations". *Benz* v. *Compania Naviera Hidalgo, supra*, 353 U.S. at 147. In view of this potential for international discord and retaliation, the Supreme Court was reluctant to apply regulatory provisions of the LMRA to foreign flag vessels and alien seamen in the absence of a clear Congressional directive.

Title IX, by way of contrast, in no way involves regulation of the internal affairs of enterprises subject to the sovereign power of foreign states. The application of §1962(b) here cannot conceivably endanger American foreign relations. The statute simply provides federal law enforcement agencies with the tools with which to combat organized crime in the United States.

Finally, we are not breaking new ground in applying federal criminal sanctions to activities involving both American and foreign contacts, as Parness suggests. The Sherman Act, 15 U.S.C. §1 et seq. (1970), has been held to proscribe conspiracies in restraint of trade which are entered into in the United States but carried out both here and abroad, assuming the requisite effect on commerce. E.g., *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-06 (1962). And, in dealing with one of the antifraud provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1970), we have held that where there is substantial United States activity and Americans are hurt, it is immaterial that the corporation is foreign. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326 (2 Cir. 1972).[14]

V.

Finally, relying on *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972), and *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947), Parness claims that §1962(b) is unconstitutionally vague on its face and as applied. He asserts that the statute failed to convey to him a sufficiently definite warning as to the proscribed conduct.

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14 We note that §2314, violations of which provide the predicates for Parness' conviction under §1962(b), has been held to apply to the transportation of foreign securities stolen in a foreign country. *United States* v. *Greco*, 298 F.2d 247, 251 (2 Cir.), *cert. denied*, 369 U.S. 820 (1962).

Section 1962(b) provides in relevant part as follows:

> "It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire . . . any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

"Racketeering activity" as charged in the instant indictment is defined in §1961(1)(B) as "any act which is indictable under any of the following provisions of title 18, United States Code: . . . [section] 2314 (relating to interstate transportation of stolen property) . . . ." Under §1961(5), a "pattern of racketeering activity" requires at least two such acts. Thus, as applied here, §1962(b) proscribes the acquisition of any interest in any enterprise affecting interstate or foreign commerce resulting from at least two acts which are indictable under §2314.

Despite what strikes us as the clarity of this statutory proscription, Parness claims that Congress committed a fatal error in defining "racketeering activity" in terms of an "act which is indictable under", rather than one which violates, the incorporated criminal statutes. He argues that, since he could not have known at the time he made his "investment" whether he would be indicted for the predicate §2314 offenses, the statutory warning that his acquisition of Hotel Corp. would violate §1962(b) was constitutionally inadequate.

Parness' argument presupposes that indictment under §2314 is a condition precedent to a §1962(b) prosecution. There is no such statutory requirement. A §1962(b) offense is predicated in turn upon certain other specified criminal offenses, the constitutionality of which is not challenged. Section 1962(b) creates a separate and wholly independent crime. As with other federal criminal statutes, violation of which is dependent upon proof of an-

other crime, e.g., the Travel Act, 18 U.S.C. §1952 (1970), and the Gun Control Act, 18 U.S.C. §921 et seq. (1970), prosecution under §1962(b) does not require that the predicate offenses must previously have been charged. Cf. *United States* v. *Nardello*, 393 U.S. 286, 293-96 (1969) (Travel Act); *United States* v. *Ramirez*, 482 F.2d 807, 813-14 (2 Cir.), *cert. denied*, —— U.S. —— (1973) (Gun Control Act); *United States* v. *Sudduth*, 457 F.2d 1198, 1201 (10 Cir. 1972) (Gun Control Act); *United States* v. *Rizzo*, 418 F.2d 71, 74 (7 Cir. 1969), *cert. denied*, 397 U.S. 967 (1970) (Travel Act).

To convict Parness under §1962(b), the prosecution was required to establish only that he acquired his interest in Hotel Corp. through two or more §2314 violations. That he may have been uncertain as to whether he would be indicted for the predicate offenses is irrelevant to the adequacy of the warning of the risk of criminality conveyed by §1962(b).

Parness claims that the phrase "pattern of racketeering activity", although clearly defined as "at least two acts of racketeering activity", is unconstitutionally vague as applied. He argues that, since he was charged under §1962(b) with devising a scheme to acquire Goberman's interest in Hotel Corp. through a "pattern" of §2314 offenses and since §2314 proscribes interstate transportation in furtherance of a scheme to defraud, he could not have known whether two indictable §2314 offenses referred to two fraudulent schemes or two acts of interstate transportation pursuant to a single scheme. This claim rests upon a misinterpretation of §2314.

The indictment charged Parness with three acts, each of which constituted a separate §2314 offense. The interstate transportation of the cashier's checks on February 4 and 9 constituted two such acts (Counts Four and Six), and Gob-

erman's interstate travel on February 4 a third (Count Five). Proof that the criminal conduct was in furtherance of a scheme to defraud was an essential element of the offense charged in Count Five only. To establish the offenses charged in Counts Four and Six, the government was required to establish only that Parness knowingly caused converted marker collections to be transported in interstate commerce. It did so. Accordingly, assuming arguendo that the claimed ambiguity under other circumstances might be said to exist, there is no such possibility here. The constitutional validity of a statute does not depend upon whether there are marginal cases in which its clarity may be in doubt. *United States* v. *Petrillo, supra*, 332 U.S. at 7; *Robinson* v. *United States*, 324 U.S. 282, 285-86 (1945); *United States* v. *Manfredi*, 488 F.2d 588, 603 (2 Cir. 1973), *cert. denied*, —— U.S. —— (1974). Rather, the test is whether the statute conveys an adequate warning as applied in a specific situation. E.g., *Williams* v. *United States*, 341 U.S. 97, 104 (1951); *United States* v. *Deutsch*, 451 F.2d 98, 113-14 (2 Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). Here, the interstate transportation of the two cashier's checks clearly were acts indictable under §2314. They provided unambiguous predicates for the §1962(b) "pattern".

We reject Parness' claim that §1962(b) is unconstitutionally vague on its face and as applied.

We have considered appellants' other claims of error and find them to be without merit.

Affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of August, one thousand nine hundred and seventy-four.

Present: HON. HENRY J. FRIENDLY,

HON. WILLIAM H. TIMBERS,
Circuit Judges.

74-1027

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

MILTON PARNESS, BARBARA PARNESS,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

By /s/ VINCENT A. CARLIN
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of August, one thousand nine hundred and seventy-four.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ WALTER R. MANSFIELD
Walter R. Mansfield
Acting Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Filed May 17, 1973)

MEMORANDUM DECISION

BONSAL, D. J.

A 5-count indictment filed on February 13, 1973 charges defendant Milton Parness, in Count One, with acquiring an interest in an enterprise in interstate or foreign commerce through a pattern of racketeering activity (defined in 18 U.S.C. § 1961(1) and § 1961(5)) in violation of 18 U.S.C. § 1962(b), the indictment further charges the defendants, Milton Parness and Barbara Parness, in Counts Two through Five, with transportation of money, securities, and a victim of fraud in interstate or foreign commerce in violation of 18 U.S.C. § 2314 and § 2.

Defendants pled not guilty to this indictment on February 20, 1973. On March 19, with leave of the Court, defendants filed the following motions:

I. For an Order pursuant to Rule 12 of the Federal Rules of Criminal Procedure dismissing Count One of the indictment on the ground that 18 U.S.C. §§ 1051 et seq. are unconstitutional;

II. For an Order pursuant to Rule 12 (F.R.Cr.P.) dismissing Count One of the indictment on the ground that 18 U.S.C. § 1963(a) is confiscatory in nature and deprives defendants of property without due process of law;

III. For an Order pursuant to Rule 12 (F.R.Cr.P.) dismissing Count One of the indictment on the ground that it fails to state a crime against Milton Parness;

IV. For an Order pursuant to Rule 12 (F.R.Cr.P.) dismissing Counts Two and Four of the indictment on the ground that they fail to state a crime against the defendants;

V. For an Order pursuant to Rule 7(d) (F.R.Cr.P.) striking from the indictment all references therein to gambling;
and

VI. For an Order pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), directing the United States Attorney to turn over to defendants all exculpatory matter in the government's possession relevant to the case.

I.

Section 1962(b) of Title 18 provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Section 1961(1) defines "racketeering activity" to include "any act which is indictable under . . . sections 2314

and 2315 (relating to interstate transportation of stolen property)." Section 1961(1) provides:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter (October 15, 1970) and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

Defendant Milton Parness argues that by defining criminal acts in terms of acts that are merely "indictable," the statute unconstitutionally vague and overbroad and, if upheld, would deprive him of due process of law.

The applicable test of vagueness is whether the language of the statute conveys "sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,* 332 U.S. 1, 8 (1947). A statute violates due process if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). See *United States* v. *Deutsch,* 451 F.2d 98 (2d Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972).

In the present case, the indictment charges violations of both 18 U.S.C. § 1962(b) and 18 U.S.C. § 2314. In order to convict the defendant on Count One, the government will have to prove beyond a reasonable doubt all the material elements of two or more acts which are themselves violations of 18 U.S.C. § 2314. The clear intent of section 1962 was to make criminal the acquisition of a business enterprise by means of a series of criminal acts. Thus, by referring to section 2314 to define those criminal acts, section 1962 does not, of itself, make the criminal law more ambiguous or vague, there is no dispute that 18 U.S.C. § 2314 provides a sufficiently ascertainable standard of guilt. As construed herein, 18 U.S.C. § 1962(b) is not unconstitutional

for vagueness. See *United States* v. *Irwin*, 354 F.2d 192, 195 (2d Cir. 1965), *cert. denied*, 383 U.S. 957 (1966).

Since, as stated above, the government must prove beyond a reasonable doubt the elements of two or more crimes in violation of section 2314 before the defendant Milton Parness can be convicted on Count One, section 1962(a) is also not overbroad in its present application, and does not prohibit constitutionally protected conduct. See *Zwickler* v. *Keota*, 389 U.S. 241, 249-50 (1967) and cases cited therein.

Accordingly, defendant's motion for an Order dismissing Count One of the Indictment on the ground that 18 U.S.C. §§ 1961 et seq. are unconstitutional is denied.

II.

Section 1963(a) provides:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Defendants argue that this section is unconstitutional in that it would permit a confiscatory "taking" of property without the due process of law guaranteed by the Fifth Amendment to the United States Constitution. Defendants cite as authority a 1790 Act of Congress prohibiting convictions or judgments from working "corruption of blood or any forfeiture of estate." 18 U.S.C. § 3563.

This statute, however, is inapplicable since Congress has specifically provided in 18 U.S.C. § 1963(a) for forfeiture of the interest acquired or maintained illegally. Moreover,

in other contexts, the forfeiture of the fruits of illegal activity has been upheld. See, e.g., *United States* v. *One Ford Coach,* 307 U.S. 210 (1939); *United States* v. *Ryan,* 284 U.S. 167 (1931); *United States* v. *$1,963 in United States Money,* 270 F.Supp. 396 (E.D. Tenn. 1967). Moreover, forfeiture can occur only in the event that Milton Parness is convicted under Count One. In the meantime, as a defendant in a criminal case, he will be accorded due process.

Accordingly, defendants' motion for an Order dismissing the indictment on the ground that 18 U.S.C. § 1963(a) is confiscatory is denied.

III.

The indictment alleges in Count One that Milton Parness organized gambling "junkets" to a resort gambling casino in the Netherlands Antilles, which casino was owned and operated by the St. Maarten Isle Hotel Corporation, N.V. ("Hotel Corp."). The indictment further alleges that Aliter Holdings, N.V. ("Aliter") acquired a 90.5% interest in Hotel Corp. from Allan Goberman, and that defendant Milton Parness acquired and maintained interests in and control of both Hotel Corp. and Aliter through a pattern of racketeering activity as defined in 18 U.S.C. §§ 1961 et seq.

Defendant Milton Parness argues that Count One is defective in that it does not sufficiently trace the transfer of the 90.5% interest in Hotel Corp. from Goberman to Parness, and thus that Count One fails to state a crime as to him.

This court finds that Count One is sufficient to apprise the defendant of what he must be prepared to meet at trial. *United States* v. *Bonanno,* 177 F.Supp. 106, 113-14 (S.D. N.Y. 1959), *rev'd on other grounds sub nom. United States* v. *Bufalino,* 285 F.2d 408 (2d Cir. 1950). See *United States* v. *Silverman,* 430 F.2d 106 (2d Cir. 1970), *cert. denied,* 402

U.S. 953 (1971); *United States* v. *Zolli*, 51 F.R.D. 522 (S.D.N.Y. 1970), and cases cited therein. The government, of course, will be required to show at trial how the alleged transfer was accomplished in proving the elements of the crime charged in Count One.

Accordingly, defendant Milton Parness' motion to dismiss Count One of the indictment is denied.

IV.

Counts Two and Four name both Milton Parness and Barbara Parness as defendants and allege that in violation of 18 U.S.C. § 2314 they caused to be transported in interstate commerce two cashier's checks dated February 4, 1971 in the amounts of $150,000 and $5,000; and a cashier's check dated February 9, 1971 in the amount of $5,000, in violation of 18 U.S.C. § 2314.

Defendants argue that the interstate transportation of the proceeds of a theft or articles purchased with stolen money is not covered by 18 U.S.C. § 2314.

In *United States* v. *Bottone*, 365 F.2d 389 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966), the Court of Appeals faced a similar question in a prosecution under 18 U.S.C. § 2314. There, defendants stole cultures of microorganisms and documents that outlined manufacturing procedures. They made copies of the documents, transporting the copies in interstate and foreign commerce, but returning the originals to the owner's files. In affirming the convictions, Judge Friendly wrote: "[W]hen the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial." 365 F.2d at 393-94. In the present case it is likewise immaterial that the money allegedly stolen was transported in interstate commerce in the form of cashier's checks.

Accordingly, defendants' motion to dismiss Counts Two and Four is denied.

V.

Defendant Milton Parness moves to strike as surplusage all references to gambling in the indictment. Defendant, however, states in his moving papers that "if the prosecution will concede that the language in the indictment referring to gambling does not charge nor imply anything illegal, defendant has no objection to leaving mention thereof in the indictment." Since the Court will instruct the jury at the appropriate time with respect to the allegations of the indictment, the matter of references to gambling can be taken up at that time. Accordingly, defendant's motion is denied.

VI.

The government has conceded, as it must, that it will comply with the requirements of *Brady* v. *Maryland*, 378 U.S. 83 (1963). Accordingly, defendants' motion to direct the government to produce exculpatory material in its possession is granted.

It is so ordered.

Dated: New York, N.Y.
May 17, 1973.

DUDLEY B. BONSAL
U.S.D.J.